No. 98-1189 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

THE BOARD OF REGENTS OF THE
UNIVERSITY OF WISCONSIN SYSTEM, ET AL.,

Petitioners,

—v.—

SCOTT HAROLD SOUTHWORTH, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE LESBIAN, GAY, BISEXUAL AND TRANSGENDER CAMPUS CENTER AT THE UNIVERSITY OF WISCONSIN-MADISON AND LAMBDA LEGAL DEFENSE AND EDUCATION FUND AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF INTEREST[1]

Amici curiae, with the consent of the parties, submit this brief, pursuant to Supreme Court Rule 37.2, in support of the petition for writ of *certiorari* filed by The Board of Regents of the University of Wisconsin System, *et al.* *Amici* have a direct interest in this matter, which concerns the mandatory student fee system at the University of Wisconsin ("University" or "UW") that funds certain activities and expenses of student organizations at the University.

The Lesbian, Gay, Bisexual and Transgender Campus Center ("LGBT Center")[2] is a registered student organization at the University. Its purposes include "to provide education on lesbian, gay and bisexual histories, cultures, health and politics[;] . . . support services[;] . . . social and cultural programs, and materials for the use of any student or community member[;] . . . [and] a centralized body for the storage and dissemination of research." The LGBT Center also advocates for a "more pluralistic university environment" and better relations among students and student groups. Affidavit of Susan K. Ullman, Attachment B, October 28, 1996. Through the student fee funding system at issue in this case, the LGBT Center has received General Student Services Fund ("GSSF") grants and Associated Students of Madison ("ASM") event grants. The LGBT Center was found by the District Court and the Court of Appeals to engage in "political

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[1]Counsel for the parties did not author this brief in whole or in part. No person or entity other than the *amicus curiae*, their members or their counsel made a monetary contribution to the preparation or submission of this brief.

[2]During the proceedings below, the LGBT Center was known as the Lesbian, Gay and Bisexual Campus Center or "LGB Center."

and ideological" activities that require the University to diminish the LGBT Center's funding according to individual students' objections to the group's expression. Appendix to Petition for a Writ of Certiorari ("App.") at 18a, 43a-44a, 93a-94a.

Lambda Legal Defense and Education Fund ("Lambda") is the nation's oldest and largest legal organization committed to achieving full recognition of the civil rights of lesbians, gay men and people with HIV/AIDS through impact litigation, education and public policy work. Lambda has long fought in the courts to protect the expressive and associational rights of all persons, including lesbian and gay college students and organizations that advocate equality for gay people. In addition, Lambda's lawyers often visit university campuses (including UW) and give speeches at the behest of student groups; they also provide Lambda publications and other resources to such groups. Thus, Lambda has a direct interest in overturning the decision below and making sure that its own expression is not thwarted by the threat that student group hosts will lose their funding if they facilitate Lambda's communication.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case set forth by petitioners. The central holding of the decision below is as follows:

> [T]he First Amendment is offended by the Regents' use of objecting students' fees to subsidize organizations which engage in political and ideological activities. This also means the Regents cannot earmark the objecting students' activity fees to fund non-political organizations and then continue to distribute the same amount of funding to the political and ideological organizations albeit with funds in "name" paid by non-objecting students. This too is merely a bookkeeping matter, with the end result being that the objecting student subsidizes the political and ideological activities of the organization.

App. 43a-44a.

REASONS FOR GRANTING THE WRIT

This case and others like it[3] call for the Court to shore up longstanding constitutional principles that apply to public fora for First Amendment activity and to stop the erosion of *amici's* freedoms of speech and association that inevitably will result from the decision below. App. 1a-12a. At the expense of *amici* and other disfavored groups, the University is forced by the Court of Appeals' decision to apply a more restrictive approach to forum access for student groups engaging in political or ideological activities than is applied to all other groups and to allow the popularity of a political or ideological message to dictate the extent of participation in the public forum. This is done in the name of avoiding "compelled speech" when, in fact, no such offense is occurring. The First Amendment injury that should concern the Court will be done not to respondents but to *amici* and their peers, at a loss to the whole UW community. *Amici* urge the Court to grant review here to clarify the important limits on "compelled speech" claims and the constitutional

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[3]In addition to the adjudicated cases cited by petitioners, other pending cases presenting similar issues include *Curry v. University of Minnesota*, Civil No. 98-583 (D. Minn.), and *For the Love of God v. Powell*, No. C-1-98-733 (S.D. Ohio).

validity of funding a limited public forum through mandatory student fees.[4]

I. It Is Not "Compelled Speech" To Be Required By Government To Contribute To A Limited Public Forum That Is Viewpoint-Neutral In Operation.

The First Amendment, of course, "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). There is also "a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's 'freedom of belief.'" *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, ___ (1997), 117 S. Ct. 2130, 2139; *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). Here, however, the Court of Appeals confuses payments to construct a stage with being forced to speak upon it or to fund an organization that uses it. In paying their fair, equal share for a limited public forum that provides a platform for expression from all sides, respondents are not being compelled to speak, associate with, or directly subsidize any particular message or organization. None of the

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[4]As petitioners show, there is conflict and confusion in the circuits as to the proper analysis and outcome in cases like this one. In addition to the cases cited by petitioners, see *Rounds v. Oregon State Board of Higher Education*, __ F.3d __, 1999 WL 86684 (9th Cir. Feb. 23, 1999), and *Veed v. Schwartzkoff*, 353 F. Supp. 149 (D. Neb. 1973), *aff'd without op.*, 478 F.2d 1407 (8th Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974). *Rounds* concludes that "[t]o the extent that *Southworth* holds that a public university may not constitutionally establish and fund [through mandatory student fees] a limited public forum for the expression of diverse viewpoints [in the face of objecting students' claims under the First Amendment], we respectfully disagree." 1999 WL at *9 n.5.

fees paid by matriculating students go directly to any organization; they are paid to UW, deposited in the state treasury, and paid out by the University for documented expenses of student groups.[5] App. 100a-101a (¶1), 110a (¶21). And when *amici* take the forum stage, they do not speak for UW, objecting students or the student body as a whole; they speak for themselves and hope their ideas are engaging. Respondents, who have equal access to the fee forum stage to express opposing points of view, suffer no First Amendment injury from contributing to its maintenance.[6]

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[5]*Cf. Carroll v. Blinken*, 957 F.2d 991, 997-98 (2d Cir. 1992) (facts of forced membership and direct transfer of funds to organization emphasized in finding cognizable compelled association).

[6]Even if some minimal infringement upon respondents' First Amendment "interest" existed, *Glickman*, 521 U.S. at ___, 117 S. Ct. at 2139, their claim would not trigger the analysis borrowed from *Lehnert v. Ferris Faculty Ass'n.*, 500 U.S. 507 (1991), by the Court of Appeals or the strict scrutiny invoked by the District Court, but instead a more lenient balancing test. *Glickman*, 521 U.S. at ___, 117 S. Ct. at 2140; *Abood*, 431 U.S. at 225. *See also Carroll*, 957 F.2d at 999 (applying less than strict scrutiny to claim arising from allocation of students' fees); *Good v. Associated Students of Univ. of Wash.*, 86 Wash. 2d 94, 104, 542 P.2d 762, 768 (1975) (employing balancing test in challenge to mandatory fee supporting the Associated Students of the University of Washington).

"Government may abridge incidentally individual rights of free speech and association when engaged in furthering the constitutional goal of 'uninhibited, robust, and wide-open' expression." *Kania v. Fordham*, 702 F.2d 475, 480 (4th Cir. 1983); *see also Rounds*, 1999 WL 86684 at *6-*7. UW's interest in creating a diverse, open forum for student group expression is vital, *Sweezy v. State of New Hampshire*, 354 U.S. 234, 250 (1957), and as an essential component of effective public education, easily outweighs any small infringement on their rights that plaintiffs conjure. Under the proper balancing test that should apply if plaintiffs are found to have some First Amendment injury here, UW's carefully tailored

The Court of Appeals did not recognize that, upon acknowledging that the UW student fee system constituted a limited pubic forum, *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (comparable student fee funding scheme at University of Virginia created "a forum more in a metaphysical than in a spatial or geographic sense, but the same [limited public forum] principles are applicable"), it had come to a fork in the road of First Amendment law. Among the universe of compelled association claims, mandatory union dues, integrated bar fees and like exactions to support **one organization**, imposed with the imprimatur of government to serve important but narrow policy ends, take courts down one analytical path. *Abood*, 431 U.S. 209; *Keller v. State Bar of Calif.*, 496 U.S. 1 (1990); *Lehnert*, 500 U.S. 507. Courts are obligated to protect dissenting members, who are already lending involuntary, direct support to expression by the group for collective bargaining or other essential purposes, from being compelled to support partisan speech not remotely germane to the limited bases for government approval of a mandatory fee.

But when, as here, a plaintiff challenges as "compelled association" contributions to the funding of a **limited public forum** that is conceded to be viewpoint-neutral in operation, courts must depart from the standards in *Abood* and its progeny and take a different analytical road. The proper analysis must protect the ability of the forum to operate in a vital and nondiscriminatory manner, without regard to the "political or ideological" viewpoints of its users.

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forum for advancing the state's weighty interest in promoting a free exchange of ideas among students -- including controversial, minority and highly ideological viewpoints -- must prevail here.

A limited public forum at a university established for the very purpose of promoting diverse expression and viewpoints can be analogized to few other contexts and imposes strict limits on efforts to suppress or constrain expression. "[U]niversities began as voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn." *Rosenberger*, 515 U.S. at 836. "The Nation's future depends upon leaders trained [at universities] through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues.'" *Keyishian v. Board of Regents of New York*, 385 U.S. 589, 603 (1967); *see also Sweezy*, 354 U.S. at 250 ("[t]he essentiality of [expressive] freedom in the community of American universities is almost self-evident"). By failing to recognize the distinct analysis appropriate to the limited public forum context before it, and by then minimizing the importance of the educational goals served by the University's fee forum, the Court of Appeals jeopardizes the vitality of all expressive fora and the education of future generations.

Nor is there any constitutional need to introduce the *Abood* or *Lehnert* precautions against unbounded, compelled speech into the public forum context. First, all members of the student community are funding a platform, not any one organization. Second, the requirement of viewpoint neutrality prevents the partisan abuse of a government-ordered fee that is a chief concern of those decisions. Likewise, any limits set by government at the outset in establishing a limited public forum serve to define what is germane to the forum's purposes and, thereafter "the State must respect the lawful boundaries it has itself set." *Rosenberger*, 515 U.S. at 829. Whereas union shops and integrated bars act outside such constitutional parameters, the University must and

concededly does abide by them.[7] Here, it is not UW that has purported to limit the fee forum or speakers to any particular kind of "educational" presentations or to restrict "ideological or political" speech or activities within the forum. Rather, the courts below imposed such a limitation, at respondents' behest, and embraced an egregious form of censorship that is antithetical to the core, vital purposes of a limited public forum for varied expressive associations at a university.

While requiring such barriers in a university setting is particularly unsettling, respondents' claim of a right to limit their forum contributions -- based solely on the content of speech that is within constitutional and forum guidelines but disagreeable to them -- threatens to undermine the foundation of all public fora and to cause havoc in their operations. Park districts can next be required to refund maintenance assessments each time the park is used for expression objectionable to some citizens. Some outraged citizens of Skokie could demand refunds of taxes used to repair the wear and tear to streets caused by Ku Klux Klan marchers, while still others could demand the same for the cost of a counter-demonstration. An assessment for new sidewalks would be refundable to each pro-choice citizen to the extent the walkways are used by abortion protesters. It is difficult to conceive how any vibrant public fora could survive under the

[7]Indeed, a claim that the limits on a limited public forum have not been fairly applied or that viewpoint discrimination is taking place within a public forum would be more conceptually akin to the complaints in *Abood/Lehnert*. The Court allowed the collection of mandatory dues regardless of dissension about speech relating to bar and union activities; it only restricted the use of fees that strayed from these established purposes.

inevitable crush of individualized exemptions on the claimed ground of compelled speech or funding.

II. The Impact Of The Decision Below Will Fall Most Heavily On *Amici* And Other Disfavored Groups, While Diminishing The Education Of All Members Of The University Community.

Campus student groups have a storied tradition of contributing in provocative ways to "the intellectual give and take of campus debate," *Healy v. James*, 408 U.S. 169, 181 (1972) (recognition of local chapter of Students for a Democratic Society), and of training young leaders for post-campus life. The notion that student expression could be too ideological or political to merit full and nondiscriminatory participation in a limited public forum set up by a public university precisely to give students experience in expressing and weighing competing ideas -- including theories of knowledge, liberty, rights, and government -- is contrary to the role of universities in our society and to the firm First Amendment protections that govern there. Left undisturbed, the impact of the decision below will fall most heavily on small, fledgling or unpopular groups like the LGBT Center -- the very groups that provoke the exchanges of viewpoint that universities cultivate for the benefit of all students.

The Court is "not free to disregard the practical realit[y]," *id.* at 183, that if student fees cannot be used to fund expressive activities with which some students disagree, student groups either will be forced to abandon expression to preserve their funding or lose funds necessary to carry out their expressive activities, or both. The disincentive to engage in "political or ideological" speech to keep funding is apparent. Further, funding decisionmakers will be tempted

not to allocate grants to such groups in the first place to preserve the size of their budget from student fee reductions, and organizational grants will shrink as students who disagree (or claim to disagree) with an unpopular group's message will withhold support.

For a group like the LGBT Center, it matters little what the group's actual activities may be; its mere existence can be said to connote a positive view of lesbian, gay, bisexual and transgender people that will be reason enough for objections by some and its defunding. *See generally Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 574 (1995) (in private parade setting, "a contingent marching behind the [GLIB] organization's banner would . . . suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals. . . ."). Indeed, the Court of Appeals emphasized that such organizations *should* face lost expressive opportunities and funding under its analysis precisely because they are unpopular. App. at 38a. *Compare Crowder v. Housing Auth. of the City of Atlanta*, 990 F.2d 586, 592 (11th Cir. 1993) ("the right to free speech in a limited public forum may not be made contingent on majority approval").

First Amendment case law is replete with past efforts to silence relatively new, controversial presences on university campuses, particularly gay, lesbian and bisexual student groups. Whether these attempts have been to exclude the groups from official recognition, from physical facilities, or from funding, however, the courts have universally recognized the free speech and association rights of gay-identified groups and other minority student organizations

and have turned back censorship efforts.[8] *See, e.g., Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543 (11th Cir. 1997); *Gay and Lesbian Students Ass'n v. Gohn*, 850 F.2d 361 (8th Cir. 1988). Here, once again, it is *amici* as well as other unpopular speakers -- on all sides of the political spectrum -- whose voices and First Amendment rights are truly at stake here, not respondents'. Small groups generally have few alternative resources to use as an expressive platform. The incantation that no First Amendment injury occurs as long as other avenues of speech remain open, App. 20a, is a fallacy that does not excuse closing down expressive avenues in a limited public forum that remain available to one's peers. *Healy*, 408 U.S. at 183. The winnowing away of unorthodox perspectives accomplished by the decision below is exactly what the First Amendment guards against.

III. The Decision Below Requires The University To Discriminate Against *Amici* And All Groups Engaging In Political Or Ideological Expression Because Of Viewpoint.

The decision below not only introduces a new and erroneous notion of compelled association into First Amendment jurisprudence, but also demands viewpoint discrimination by public universities or the courts that oversee them. All student groups engaging in political or ideological expression become a second tier of public forum participants, subject to discriminatory exclusion from full

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[8] While the Court of Appeals refers to the LGBT Center and other groups as "private associations," registered student organizations like LGBT must be not-for-profit and formalized, must be composed mainly of, controlled and directed by UW students, and must be related to student life on campus. App. 106a-107a.

forum access. Within this second tier, state actors are forced to withhold funding from the objected-to groups because of their viewpoint; the University may not "continue to distribute the same amount of funding to the political and ideological organizations albeit with funds in 'name' paid by non-objecting students." App. 44a.

Speech from a political or ideological perspective, like religious speech, cannot be singled out for diminished access to a limited public forum. *Rosenberger*, 515 U.S. at 831. Yet that is exactly what the Court of Appeals' remedy requires. *Rosenberger* held unconstitutional a funding-forum limitation under which "the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints." The Court made clear that similar efforts, as here, to de-fund -- and therefore curtail -- some or all political or ideological viewpoints on a topic also are constitutionally flawed:

> If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. *It is as objectionable to exclude* both a theistic and an atheistic perspective on the debate as it is to exclude *one, the other, or yet another political, economic, or social viewpoint.*

Id. (emphasis added). *See also Gohn*, 850 F.2d at 366 ("when [university] funds are made available, they must be distributed in a viewpoint-neutral manner").

The District Court's effort to distinguish "political and ideological" from primarily educational speech reveals the

inherent viewpoint discrimination in such an endeavor. The same flaws corrupt any application in the present context of a "germaneness" standard or the *Lehnert* test as interpreted by the Court of Appeals. App. 25a-43a. The District Court singled out *amicus* LGBT Center for reduced funding because of expressive efforts which, in its view, were allegedly "primarily concerned with promoting the homosexual agenda and promoting pro-homosexual political activism." App. 94a. The District Court arbitrarily determined that such speech is too political or ideological to have sufficient educational merit to warrant a mandatory fee. App. 94a-95a. The Court of Appeals engaged in similar judgments, as by concluding that the International Socialist Organization is "unlike, for example, a political science class on socialism . . . [and] only incidentally concerned with education." App. 19a, 29a.

But student learning at a university -- to formulate, express and evaluate ideas -- is hardly limited to the traditional classroom or advanced by the exclusion of competing political and ideological discourse. Fora created by student fees, like the one contested here, have long enriched the education of college students through exposure to fresh perspectives, diverse life experiences, and the opportunity to train in organizational operations and advocacy. Such opportunities can profoundly alter a student's life course. It is a dangerous premise to hold that the "intellectual give and take of campus debate," *Healy*, 408 U.S. at 181, should exclude much political and ideological expression and be limited only to those ideas that students know ahead of time that they want to hear.

CONCLUSION

This Court should grant review to restore the vitality of UW's viewpoint-neutral limited public forum and the rights of *amici* to full and nondiscriminatory participation in that forum.

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Respectfully submitted,

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